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2 UNITED STATES DISTRICT COURT
3 WESTERN DISTRICT OF WASHINGTON
4 AT TACOMA

5 DONALD STOCKMYER,

6 Plaintiff,

7 v.

8 D. FETROE, et al.,

9 Defendants.

CASE NO. C16-5614 BHS

ORDER ADOPTING IN PART
AND DECLINING IN PART
REPORT AND
RECOMMENDATION

10 This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable Theresa L. Fricke, United States Magistrate Judge (Dkt. 43), the
11 objections of Defendants Fetroe, Johnson, and Klauk (“Defendants”) to the R&R (Dkt.
12 46), and Plaintiff’s objections to the R&R (Dkts. 49, 50).
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14 The background of this case is set out in full by the R&R. Dkt. 43 at 2–13. On
15 August 24, 2017, Judge Fricke entered an R&R recommending that summary judgment
16 be granted in favor of Defendants. Dkt. 43. On September 1, 2017, Defendants filed their
17 objections. Dkt. 46. On October 4 and 5, 2017, the Court received letters from Plaintiff
18 objecting to the R&R. Dkts. 49, 50.

19 The district judge must determine de novo any part of the magistrate judge’s
20 disposition that has been properly objected to. The district judge may accept, reject, or
21 modify the recommended disposition; receive further evidence; or return the matter to the
22 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

1 Defendants request that the Court consider newly submitted evidence that was
2 cited in their initial motion for summary judgment but inadvertently omitted from the
3 supporting exhibits. Dkt. 46 at 3. In support of their request, Defendants have submitted
4 the previously omitted excerpts from a deposition of Plaintiff wherein he admits that he
5 did not file any administrative grievances regarding (1) an alleged assault by a fellow
6 inmate while he was being transported or (2) the Clallam Bay Correction Center's failure
7 to provide him with a second mattress.¹ Dkt. 47-1 at 3–7. In light of the submitted
8 evidence, it is clear that Plaintiff did not exhaust his administrative remedies before
9 initiating his present claims based on these allegations. Accordingly, Defendants' motion
10 for summary judgment on these claims based on Plaintiff's failure to exhaust should be
11 granted—although doing so seems unnecessary, as the R&R has already recommended
12 that these claims be dismissed on other grounds.

13 Additionally, Defendants note that the R&R appears to conclude that all of
14 Plaintiff's claims should be dismissed with prejudice. Dkt. 46 at 3–4. *See also* Dkt. 43 at
15 28. However, the exclusive basis for dismissing several of Plaintiff's claims is his failure
16 to exhaust administrative remedies. As noted in the R&R, “[i]f a prisoner has failed to
17 exhaust his administrative remedies, dismissal without prejudice is appropriate.” Dkt. 43
18 at 17 (citing *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), *overruled on other*
19 *grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014)). Therefore, to the extent that
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22 ¹ Judge Fricke has nonetheless recommended this claim be dismissed as untimely in light of the
applicable statute of limitations. Dkt. 43 at 18.

1 Plaintiff's claims are dismissed based on his failure to exhaust administrative remedies,
2 dismissal should be without prejudice.

3 Finally, the Court notes that Plaintiff has submitted two letters objecting to the
4 R&R. Dkts. 49, 50. However, in these letters, Plaintiff merely restates his arguments in
5 opposition to summary judgment without assigning any error or deficiency to the R&R's
6 analysis. *See* Dkt. 50. The Court agrees with the analysis in the R&R and therefore adopts
7 it.

8 The Court having considered the R&R, the parties' objections, and the remaining
9 record, does hereby find and order as follows:

10 (1) The R&R (Dkt. 43) is **ADOPTED in part** and **DECLINED in part** as
11 described above;

12 (2) The motion for summary judgment of Defendants Fetroe, Johnson, and
13 Klauk (Dkt. 31) is **GRANTED**; and

14 (3) To the extent that any of Plaintiff's claims are dismissed solely on the basis
15 of his failure to exhaust administrative remedies, those claims are **DISMISSED without**
16 **prejudice**.

17 Because there are no issues outstanding upon the Court's adoption of the R&R, the
18 clerk shall enter judgment in favor of Defendants and close this case.

19 Dated this 10th day of October, 2017.

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21 BENJAMIN H. SETTLE
22 United States District Judge